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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GILBERT JOSEPH MONTOYA, Defendant and Appellant.	E034069 (Super.Ct.No. FVI 09587) OPINION

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata, Judge. Affirmed.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Barry J.T. Carlton, Supervising Deputy Attorney General, and Jonathan J. Lynn, Deputy Attorney General, for Plaintiff and Respondent.

1. Introduction

Defendant Gilbert Joseph Montoya was convicted of committing a petty theft with priors and was sentenced to 25 years to life under the "Three Strikes" law. On appeal, defendant raises the following claims: the court failed to exclude defendant's admissions that were obtained in violation of his constitutional rights; the court gave erroneous instructions on jury deliberations, the standard of proof, and the prior theft conviction; the court erred in denying defendant's motion to strike his prior convictions or reduce the current charge to a misdemeanor; and defendant's sentence violated the equal protection and cruel and unusual punishment clauses.

For the reasons provided below, we reject defendant's arguments and we affirm his convictions.

2. Factual and Procedural History

At approximately 2:45 p.m. on March 12, 1999, as Andrew Morales was working as a loss prevention manager at the Hesperia K-Mart store, he observed defendant place a television into his shopping cart. Without paying for the television, defendant passed the cash register at the electronics department and the registers located at the front of the store. After defendant exited the store, Morales stopped defendant, identified himself, and asked defendant to return to the store. Defendant walked back into the store, left the shopping cart with the television, and then walked out again. When Morales followed defendant and asked him to accompany him back into the store, defendant said that there was no need for him to return. When Morales told defendant that he would have to return either cooperatively or by force, defendant became agitated and hostile. Defendant told

Morales, "If you get near me, I will shank you." Not wanting to risk a physical confrontation, Morales allowed defendant to leave. Morales observed a woman pull up to defendant in a white pick up truck. Defendant got into the truck and the two sped away. Morales took note of the truck's license plate number.

The truck was registered to defendant. On March 17, 1999, Deputy Sheriff Joseph Vaughn contacted defendant and interviewed him concerning the incident. During the interview, defendant admitted taking the television.

On March 30, 1999, the San Bernardino County District Attorney charged defendant with the following crimes: second degree commercial burglary (Pen. Code § 459)[1]; petty theft with priors (§§ 666/484); and a criminal threat (§ 422). The district attorney also charged defendant with 22 prior robbery convictions. (§ 1170.12, subds. (a)-(d).)

The jury found defendant guilty of the petty theft, found him not guilty of the criminal threat, and could not reach a verdict on the burglary. In a bifurcated proceeding, the jury also found true the 22 prior robbery convictions. The court later sentenced defendant to 25 years in prison under the Three Strikes law.

3. *Miranda*[2]

Defendant claims the trial court erred in denying his motion to suppress evidence

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[1] All further statutory references will be to the Penal Code unless otherwise stated.

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

on the ground Deputy Vaughn failed to advise him of his *Miranda* rights before conducting the custodial interrogation and obtaining his admissions. Defendant also claims that this initial violation was not cured by the subsequent *Miranda* warnings. Defendant therefore claims that the trial court should have excluded all of his admissions before and after the *Miranda* warnings.

Under the state and federal Constitution, a person who is subjected to custodial police interrogation must be informed of his right to be silent and right to counsel. (*Miranda v. Arizona* (1966) 384 U.S. 436, 444; *People v. Whitson* (1998) 17 Cal.4th 229, 244.) Any statements obtained in violation of *Miranda* must be excluded. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1033.)

A person is in police custody when he has been placed under arrest or otherwise deprived of his freedom of movement in a significant way. (*Stansbury v. California* (1994) 511 U.S. 318, 322; *People v. Ochoa* (1998) 19 Cal.4th 353, 401.) "[T]he term 'custody' generally does not include 'a temporary detention for investigation' where an officer detains a person to ask a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. [Citation.]" (*People v. Farnam* (2002) 28 Cal.4th 107, 180.) The court applies an objective test in determining whether a person was in custody, i.e., not free to leave under the circumstances surrounding the interrogation. (*Ochoa, supra*, at pp. 401-402.) In reviewing the court's determination, we uphold the court's factual findings if supported by substantial evidence and we independently determine whether a reasonable person would have felt free to end the conversation. (*Ibid*.)

The evidence indicates that the encounter was a brief detention designed to gather information and confirm the officer's suspicions concerning the theft incident. During the evidentiary hearing, Deputy Vaughn testified that he went to defendant's residence to investigate the burglary. Vaughn, who was accompanied by only an Explorer scout, initially encountered defendant's girlfriend and her mother. After defendant came out to the front room, Vaughn asked him if he could speak to defendant outside. Outside the residence, Vaughn began to ask defendant several questions concerning the incident at the K-mart.

The conversation was taped. After obtaining defendant's personal information, Vaughn informed defendant that his truck was involved in a theft at the K-mart. After Vaughn told defendant that the truck likely would be impounded, the two discussed the nature of the crime committed. At one point, Vaughn accused defendant and his girlfriend of being involved in the crime. Although defendant initially denied any involvement, Vaughn asked him if he knew what happened. Defendant then admitted, "Yes I did yes I did try to do it. I'll be honest with you." Vaughn continued to ask defendant about the details of the theft. Although defendant admitted his involvement, he repeatedly denied trying to "shank" the security guard.

Various factors, including the location, the length of time, and the number of officers present, indicated that the encounter was not custodial. (*People v. Boyer* (1989) 48 Cal.3d 247, 271-272, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1; *People v. Forster* (1994) 29 Cal.App.4th 1746, 1753.) The conversation lasted for only 10 to 15 minutes. Defendant made one of his most

incriminating statements within the first few minutes. Vaughn contacted defendant at his residence. As opposed to a police station or similar surroundings, a person's home generally is not a coercive environment. (See *People v. Valdivia* (1986) 180 Cal.App.3d 657, 662; *People v. Blouin* (1978) 80 Cal.App.3d 269, 283.) With the exception of the scout, Vaughn was alone. Vaughn did not place defendant in handcuffs, display his weapon, or in any other way limit defendant's freedom. Based on these factors, a reasonable person would not have believed that he was in custody at the time of the initial encounter. (See *In re Joseph R*. (1998) 65 Cal.App.4th 954, 961.)

Furthermore, despite Vaughn's accusatory tone, his words did not suggest that defendant was under arrest. An officer's subjective views are generally irrelevant to the determination of whether a person is in custody. (*Stansbury v. California, supra*, 511 U.S. at p. 323.) The only relevant inquiry is how a reasonable person would have perceived the circumstances, including any statements made by an officer concerning his suspicions. (*Id*. at pp. 323-324.) "An officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned. [Citation.] Those beliefs are relevant only to the extent they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her '"freedom of action."' [Citation.] Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest. The weight and pertinence of any communications regarding the officer's degree of suspicion will depend upon the facts and circumstances of the particular case."

(*Id*. at p. 325.)

During the conversation, Vaughn voiced his suspicions. At one point, Vaughn said, "I'm sure if I take you into custody right now, we go to K-Mart they're gonna I.D. you. Are they gonna [I.D.] you as being the one trying to take the TV?" After discussing the possibility of impounding defendant's truck, Vaughn also said, "And I know its [*sic*] you and I know Pam was there. She was the one driving the car. Now the question before us is the car gonna go to car jail and are both you and Pam gonna go to jail?" By these questions, Vaughn was attempting to confirm his suspicions that defendant was the man who took the television. Vaughn was questioning defendant to gain more information, even a confession, to justify an arrest. While a reasonable person would have viewed Vaughn's comments and questions as an attempt to elicit an incriminating statement, he would not have understood Vaughn's words as suggesting that he was already in custody based on what information Vaughn conveyed during the interrogation. Before defendant's admission, Vaughn spoke of Morales's general description of the suspect and the crime and the positive identification of the vehicle used in the crime. Without more, this information and Vaughn's articulated suspicions would not have led a reasonable person to believe that he was under arrest.

The consensual nature of the subsequent search further indicated that the initial encounter was not conducted by force or coercion. After defendant made his admission, Vaughn asked him if he could look inside the house. Defendant eventually allowed Vaughn to search his room. The search was consensual because defendant said, "Okay. You can check inside my room only." Likewise, the interrogation was consensual

because defendant agreed to go outside and talk to Vaughn about the incident. Nothing said or done by Vaughn transformed the encounter into a custodial situation.

We conclude that, because defendant was not in custody at the time of the interrogation, Vaughn had no duty to advise him of his *Miranda* rights. The trial court, therefore, properly denied defendant's motion to exclude his admissions.

4. CALJIC No. 17.41.1

Defendant claims the trial court violated his federal and state constitutional rights by instructing the jury with CALJIC No. 17.41.1. In *People v. Engelman* (2002) 28 Cal.4th 436, while the California Supreme Court advised against using CALJIC No. 17.41.1, the court definitively held that the instruction did not infringe upon a criminal defendant's constitutional rights.

Defendant nevertheless claims that, despite the court's holding in *Engelman*, the circumstances in this case indicated that the instruction had a prejudicial effect on his trial. We disagree. The record fails to support defendant's claim. In fact, the jury found defendant not guilty of making a criminal threat and could not reach a verdict on the burglary offense. The verdicts suggest, therefore, that the instruction was not used to browbeat minority jurors and did not cause any other inappropriate intrusions into the jury's deliberations. (See *People v. Jordan* (2003) 108 Cal.App.4th 349, 369.) Furthermore, it is pure speculation to suggest that, after voting freely on the substantive offenses, the same jurors later applied the instruction to coerce or intimidate the holdout juror during their deliberations on the prior convictions. There were no reports from the jury to substantiate defendant's claim. (See *People v. Ortiz* (2003) 109 Cal.App.4th 104,

119, fn. 7; *People v. Harper* (2003) 109 Cal.App.4th 520, 523; *People v. Rivera* (2003) 107 Cal.App.4th 1374, 1382.) We therefore reject defendant's claim of prejudicial error.

5. CALJIC No. 2.90

Defendant claims that the court erred in instructing the jury on the burden of proof with the current version of CALJIC No. 2.90 rather than the former version of the instruction, which also included the phrase "to a moral certainty." Defendant claims that the current version of the instruction, in using the phrase "abiding conviction" without reference to any particular degree of persuasion, fails to convey the criminal standard of proof. Such claims have been rejected unanimously. (See, e.g., *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1091; *People v. Hearon* (1999) 72 Cal.App.4th 1285, 1287.) And defendant fails to provide any new or persuasive argument to merit reconsideration of the issue.

6. Petty Theft Instruction

Defendant claims the trial court erred by instructing the jury with CALJIC No. 17.26. Specifically, defendant objected to the following statement: "You are instructed that the defendant is the person whose name appears on the documents admitted to establish the convictions." Defendant argues that the instruction eliminated the sole issue of identity from the jury's consideration.

The California Supreme Court, however, held that a defendant is not entitled to a jury determination of identity. (§ 1025, subd. (c); *People v. Epps* (2001) 25 Cal.4th 19, 26-27.) Once the court determines the issue of identity, the court may instruct the jury to that effect, namely, that "the defendant is the person whose name appears on the

documents admitted to establish the conviction." (*People v. Kelii* (1999) 21 Cal.4th 452, 458.) The only remaining issues to be decided by the jury are "whether those documents are authentic and, if so, are sufficient to establish that the convictions the defendant suffered are indeed the ones alleged." (*Id*. at pp. 458-459; see also *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1165.)

The court properly instructed the jury in accordance with the law.

7. *Romero*[3] Motion

Defendant claims the trial court erred in denying his motion to strike his prior convictions under section 1385 or reduce the current charge under section 17, subdivision (b). Defendant argues that the court should have exercised leniency based on his psychologist's recommendation for outpatient drug treatment in lieu of incarceration and his other letters of support and certificates of achievement.

Generally, under section 1385, the trial court has the discretion to dismiss a prior strike conviction on its own motion in furtherance of justice only if it finds, "in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161; *Romero, supra*,

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3 *People v. Superior Court (Romero*) (1996) 13 Cal.4th 497.

13 Cal.4th at pp. 530-531.) An appellate court reviews the trial court's decision for an abuse of discretion. (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998.)

Under section 17, subdivision (b), the trial court had discretion to reduce a "wobbler" offense from a felony to a misdemeanor. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.) In making this determination, the court also considers individualized consideration, including the circumstances of the offense and defendant's conduct during the trial. (*Id.* at p. 978.) Furthermore, "the fact a wobbler offense originated as a three strikes filing will not invariably or inevitably militate against reducing the charge to a misdemeanor. Nonetheless, the current offense cannot be considered in a vacuum; given the public safety considerations underlying the three strikes law, the record should reflect a thoughtful and conscientious assessment of all relevant factors including the defendant's criminal history. [Citations]" (*Id.* at p. 979.)

In denying defendant's requests to strike a conviction or reduce his current charge to a misdemeanor, the trial court thoughtfully and properly exercised its discretion. After acknowledging defendant's good conduct during the trial, the court noted that defendant's prior robberies did not occur during a single incident. Instead, defendant committed the crimes at several locations, at different times, and against about 25 separate victims. Defendant often approached the victims and robbed them at gunpoint. The court also noted that defendant was off of parole for only 11 months when he committed the current offense. The court remarked that defendant still failed to accept responsibility for the current crime and blamed his girlfriend for the incident. Based on these considerations, the court denied defendant's motions.

We discern no abuse of discretion. As to his prior convictions, the record shows that defendant robbed about 20 different small businesses in November and December of 1988. He often entered a store, selected some merchandise, walked up to the clerk, and demanded the money in the cash register. During most of the robberies, defendant simulated a weapon or displayed a small handgun. Although all of the offenses were committed around the same time period, the record indicates 22 distinct crimes involving multiple victims.

As noted by the court, defendant failed to take responsibility for his actions. During the current offense, defendant failed to cooperate and return to the store as directed by the loss prevention manager. Despite the overwhelming evidence and his own confession, defendant continued to blame his girlfriend for the incident. Also, as noted by the court, this incident occurred within a year after being off of parole. Based on these facts, it appears that defendant has failed to take personal responsibility for his actions and learn from his mistakes so as to prevent such behavior in the future.

In addition to blaming his girlfriend, defendant also blamed his behavior on his drug addiction. Defendant's drug problem, however, provides no grounds for mitigation. (*People v. Gaston* (1999) 74 Cal.App.4th 310, 322.) Despite his admitted drug problem, nothing in the record shows that defendant has made any efforts to resolve his drug dependency. (*People v. Gaston, supra,* 74 Cal.App.4th at page 322; *People v. Barrera* (1999) 70 Cal.App.4th 541, 554-555.) Under the circumstances, defendant's drug dependency simply reveals a greater level of dangerousness because his criminal history suggests that defendant is willing to commit violent crimes to support his drug habit.

The record does not suggest that defendant was entitled to leniency. We conclude that the trial court did not abuse its discretion in denying defendant's motion to strike his prior offenses.

8. Equal Protection

Defendant claims that his sentence was a denial of equal protection because he was treated differently from similarly situated petty theft offenders who have committed other prior serious felonies. Defendant argues that, because his prior serious felonies were theft offenses, the law arbitrarily singles him out to receive a stricter penalty. For this reason, defendant claims the Three Strikes law violates the equal protection clauses of the federal and state Constitutions.

Courts have repeatedly upheld the Three Strikes law against equal protection challenges. (See, e.g., *People v. Edwards* (2002) 97 Cal.App.4th 161, 164-165; *People v. Cressy* (1996) 47 Cal.App.4th 981, 993; *People v. Hamilton* (1995) 40 Cal.App.4th 1615, 1619-1620; *People v. Sipe* (1995) 36 Cal.App.4th 468, 483-484.) One court specifically has considered and rejected the same argument raised by defendant here. (See, e.g., *People v. Nguyen* (1997) 54 Cal.App.4th 705, 719.)

In *Nguyen*, the court explained: "The commission of a new theft offense by an individual *with* a history which connects theft-related crimes with serious or violent criminal conduct is a much more serious event and poses a much greater threat to society than the commission of a petty theft offense by an individual whose criminal history does not disclose such a connection. In the absence of this connection, an individual's commission of petty theft does not reflect a continuation of his or her pattern of serious

misconduct. The state has a strong and compelling interest in protecting its citizens from the harm associated with serious or violent criminal conduct. An individual who has previously been convicted of and incarcerated for committing a serious theft-related offense and has not been deterred from committing a new theft crime can only be deterred from this course of serious misconduct by harsh punishment. As the state has a compelling interest which necessitates the challenged distinction, the classification does not violate equal protection." (*People v. Nguyen, supra*, 54 Cal.App.4th at p. 719.) We agree with *Nguyen* court's reasoning and adopt its holding that the Three Strikes law, as applied to a defendant who commits a petty theft with a prior felony, does not violate equal protection.

Defendant nevertheless argues that the commission of a petty theft shows that past punishment has successfully deterred him from committing more serious theft-related offenses. The commission of a lesser offense, however, does not demonstrate successful deterrence. More often than not, it simply signifies a lack of opportunity rather than the absence of a desire to steal and a willingness to act upon that desire. Deterrence is successful when defendant stops stealing altogether.

In any event, as stated in *Nguyen*, the different penalties imposed upon thieves with a prior history of theft related offenses is justified based on the state's compelling interest in deterring recidivism, and particularly, the commission of the same types of offenses. (*Nguyen, supra*, 54 Cal.App.4th at p. 719; see also *Edwards, supra*, 97 Cal.App.4th at p. 165.) The equal protection argument focuses on the nature of the prior convictions, rather than the severity of the current offense. By focusing on the severity of

the current offense, defendant's argument may be construed as a general complaint against the application of the Three Strikes law to any felony, including a petty theft with a prior. (§ 667, subd. (b).) Current law, however, supports such application and, therefore, any complaints concerning the Three Strikes law should be directed at the Legislature.

We conclude that defendant has failed to establish an equal protection violation.

9. Cruel and Unusual Punishment

Defendant claims his 25-years-to-life sentence violates the federal and state guarantee against cruel and unusual punishment.

Both the federal and state Constitutions require that the punishment fits the crime. Under the prevailing view, the Eighth Amendment of the federal Constitution is violated when a sentence is "grossly disproportionate" to the crime. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001.) Similarly, the California Constitution is violated when the punishment "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) Lengthy prison sentences imposed under a recidivist statute have long survived scrutiny under both constitutions. (See, e.g., *In the Matter of Evelyn Rosencrantz* (1928) 205 Cal. 534, 539-540; *People v. Weaver* (1984) 161 Cal.App.3d 119, 125.)

Under California's Three Strikes law, when the defendant has at least two prior strike convictions, the Legislature has set life sentences as the appropriate penalty for any current felony. (§§ 667, subd. (e), 1170.12, subd. (c).) Under the statute, a 25-years-to-

life prison sentence is imposed not only for the defendant's current felony, but also for his recidivism. (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 366.)

In this case, the 25-years-to-life sentence was appropriate based on defendant's current offense, his criminal history, and other individualized considerations. (*People v. Dillon* (1983) 34 Cal.3d 441, 479.) As described above, defendant committed 22 different robberies. Defendant's prior crimes were violent crimes, often involving the use of a firearm. For his prior crimes, defendant served over six years in prison. He committed the present theft offense shortly after being released from parole. As defendant resorted again to stealing, he not only took a high-priced item from the K-mart store, he also engaged in a hostile confrontation with one of the store employees. From the time of the offense to the time of trial, defendant has minimized his culpability for the crime. Because he had returned the television upon demand, defendant claimed that he had done nothing wrong and that the incident arose from a misunderstanding that his girlfriend had not yet paid for the merchandise. Defendant's failure to assume responsibility and change his behavior supports the application of the recidivist statute, which is based on the premise that such individuals will continue to commit crimes unless they are removed from society for an extended period of time. (See *People v. Romero* (2002) 99 Cal.App.4th 1418, 1432.) When considered in light of his recidivism, defendant's life sentence would survive proportionality review.

No additional analysis is necessary. Unlike other penal provisions that set forth the appropriate penalty for a certain crime, defendant's indeterminate sentence resulted from the court's application of California's recidivist statute. (*People v. Ayon* (1996) 46

Cal.App.4th 385, 400, disapproved on other grounds by *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1338; see also *People v. Cooper* (1996) 43 Cal.App.4th 815, 826-828.) Despite recent challenges to California's Three Strikes law, recidivism continues to be a legitimate sentencing consideration. (See *Romero, supra,* 99 Cal.App.4th at p. 1431.) Although California may have one of the strictest laws in the nation, courts must give deference to legislation that was both enacted by the Legislature and approved by the people. (*Id*. at p. 1429.) Therefore, in the absence of any legislative amendment or any binding judicial authority, this court will continue to uphold life sentences under California's recidivist statute.

We conclude that, as the law currently stands, defendant's life sentence does not constitute cruel and unusual punishment under both the state and federal Constitutions.

10. Disposition

We affirm defendant's convictions.

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s/Gaut
J.

We concur:

s/Hollenhorst
Acting P. J.

s/Ward
J.